In The

Supreme Court of The United States

February, 1943, Term.

No. .....

MAX STEPHAN, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF FOR PETITIONER.

STATEMENT OF FACTS.

This brief is filed in support of a petition for a writ of certiorari to the United States Circuit Court of Appeals, for the Sixth Circuit, to review that court's affirm-

ance of petitioner's conviction of treason in the District Court of the United States, for the Eastern District of Michigan.

Petitioner was indicted June 17, 1942, for treason in one count, reciting twelve overt acts. (There is no overt act No. 6) (R. 1-6). He was convicted (R. 10) before the Hon. Arthur J. Tuttle, one of the District Judges for the Eastern District of Michigan, by a jury, July 2, A. D. 1942, for the crime of treason, and sentence was imposed August 5, A. D. 1942 (R. 345-363) that petitioner, "Max Stephan, be remanded to the custody of the United States Marshal for the Eastern District of Michigan (R. 362), and be by him taken to the Federal Correctional Institution at Milan, Michigan, and there confined in safe and secure custody until the 13th day of November, A. D. 1942, and on that day, within the walls of the Federal Correctional Institution, or within an enclosed yard thereof, the said defendant, Max Stephan, be by the said United States Marshal hanged by the neck until he, the said Max Stephan, is dead."

Thereafter, August 11, 1942, a notice and grounds of appeal was filed (R. 27-28) and after a hearing in the United States Circuit Court of Appeals, Sixth Circuit, December 12, 1942, the court affirmed the conviction on February 6, 1943.

It is this affirmance by the Circuit Court of Appeals, Sixth Circuit, that petitioner here seeks to review by certiorari.

Briefly stated, the material facts as shown by the evidence are, that on April 18, 1942, Peter Krug, a German Luftwaffe officer (R. 52) age 22 (R. 101), arrived at the

home of Mrs. Margareta Johanna Bertelman in Detroit, Michigan (R. 55). He had been shot down over England nearly two years before, on August 28, 1940 (R. 52), was interned in Canada (R. 53), and made his escape across the Detroit River to Detroit (R. 53). He had never seen or known Mrs. Bertelman, but knew of her, because she had sent things to inmates of the prison camp (R. 80-175).

Mrs. Bertelman in some fright after Krug had made his identity known (R. 167) called defendant, Max Stephan, on the telephone, and asked him to come to her home (R. 57). Defendant was a man of 58 a naturalized citizen of seven years (R. 50) and a restaurant keeper. He went to her home (R. 58). On seeing the lad and hearing his story he told him he had no chance to escape to Germany as Krug signified his desire to do and defendant suggested that he return to the prison camp (R. 168).

Mrs. Bertelman left $20.00 on the table before the two men (R. 169-170) which Krug took (R. 60). Defendant then drove him in his own automobile to his place of business and gave him breakfast (R. 62). Mrs. Bertelman gave Krug some clothes Krug being poorly dressed (R. 60) (R. 166-169).

Later in the day defendant went with Krug to a cafe and bought food for both, and introduced him as "one of the Meyers boys." Krug had told Stephan it was his birthday (R. 63). Still later in the day they went to the Progressive Club, where Stephan bought drinks and introduced Krug as a friend from Milwaukee (R. 91-92). Still later they went to the place of business of one Theodore Donay. Donay gave Krug $20.00 (R. 69) and Krug told his identity (R. 68), related events of his

escape and told of his desire to get back to Germany (R. 68-69).

Later Krug and Stephan went back to Stephan's restaurant where Stephan furnished Krug dinner (R. 70) and refreshments, and again introduced him as a friend from Milwaukee (R. 74).

Stephan helped arrange for Krug to stay over night at a hotel (R. 74) which Krug did (R. 75). The next morning Stephan took Krug to the interurban bus station, purchased his breakfast (R. 76), bought him a bus ticket to Chicago, and saw him off on a bus to that city (R. 76), where Krug went (R. 76).

Krug did not start to leave this country until after he had gone from Chicago to Columbus, then to New York City, after which he headed for Mexico (R. 77). He was recaptured in San Antonio, Texas (R. 77).

By the testimony of two female witnesses the Government introduced testimony showing that on April 18th, Krug having expressed his desire "for a woman," he was escorted by Stephan to the home of the witness, Alvina Ludlow (R. 185-190) and there had immoral relations with the witness, Ethel Merrifield. This testimony was allowed to stand for one day, then stricken by the court (R. 261-263), together with the allegation in the indictment of the claimed overt act number 10 (R. 262).

While at Donay's place the latter and Krug conversed about a certain Von Werra (R. 70-73) whom Krug knew to have been a German flyer. The conversation related

to the facts that the German Consul had furnished $50,000.00 bail for Von Werra who had, as the District Attorney stated in leading questions (R. 73), escaped to Germany and been killed in action. Krug, the witness, knew nothing about the Von Werra matter except what he had read from newspapers (R. 72-73).

The testimony was objected to (R. 71) but the court admitted it (R. 71) stating that unless it was "connected up," which the District Attorney promised to do, he would strike it. It was never connected up and never stricken out.

On cross-examination (R. 78-111) the witness Krug refused to answer questions, stating sometimes that it was a military secret, and other times refusing for other reasons. The court refused to strike out the testimony of Krug but permitted it to stand. This was after full direct examination by the District Attorney (R. 52-81), and was followed by re-direct examination (R. 111). The court expressed itself as unable to compel answers to questions put by defense counsel (R. 82-83) evidently because Krug was already in custody as a prisoner of the Canadian authorities, and the court was not possessed of any weapon to compel answers.

In his argument to the jury the District Attorney repeatedly and insistently asked the jury to place themselves in the position of defendant (R. 309-310). He states, that this was the kind of a case "where the death penalty would be absolutely unfair" (R. 303). He attributed friendship between Krug and defendant (R. 304). He stated (R. 305), "Krug's statement stands on the record in this case, ladies and gentlemen of the jury, absolutely uncontradicted." He several times repeated

the phrase "black-hearted traitor," as applied to defendant (R. 306, 307) and several times said, "No, Max Stephan, you won't get away with it" (R. 269). He made allusion to defendant as, "poor Max Stephan,—dumb Max Stephan—generous-hearted, good-hearted Max—" (R. 306).

It is established in the record that Krug came into court and gave the Nazi salute when the District Attorney argued, "I hold no brief for him, as he stepped into this court and gave a Nazi salute" (R. 305). The obnoxious and uncalled for display of a German uniform, the emblem of the hated Nazi regime, flaunted before the jury, was palpably, incurable error.

From the testimony of the witness, Parker (R. 201-216, 233-235) and Gasteiger (R. 198-201) it is shown that Krug was apprehended in San Antonio, Texas, May 31, 1942, six weeks after the events occurred with which Stephan is charged. Over objection these witnesses were permitted to testify to statements made subsequent to Krug's departure from Detroit and they identified articles he had in his possession at the time, which had no connection with the charge and which were admitted into evidence—epaulets, a map showing Krug's bus route after he left Detroit, a revolver and cartridges. These statements were later stricken from the record, too late, without curative instruction, but the exhibits permitted to remain (R. 366).

The phrases "a spy for" and "a secret representative of the Government of Germany," as applied to Krug, were used in the trial for the first time by the court, when he read the indictment to the jury in his charge (R. 328). There was no evidence to support the use of

these terms. Krug was a flyer and had been a prisoner of war since he was shot down over England, without communicating with his superiors during the nearly two years ensuing (R. 111).

For three days and nights, during the trial when public feeling was tense, the jury separated at the close of each session, to go where they would, exposed to hostile sentiment, newspaper articles, and frequent radio broadcasts concerning the trial.

At the close of the Government's case a motion to direct a verdict of not guilty was made on behalf of defendant (R. 236).

This motion was denied (R. 239).

One month after verdict (R. 10) and after conferring with the probation officer together with special agents of the Federal Bureau of Investigation, the court imposed the disproportionate sentence of death (R. 345-363).

Such, very briefly, are the material facts as disclosed by the record and as alleged by the petition for a writ of certiorari.

SUMMARY OF ARGUMENT.

I. The indictment is bad for failure to allege overt acts that constitute the Crime of Treason. The overt acts alleged do not manifest criminal intent nor tend toward the alleged object of the crime. These allegations must be clear and not rest in mere conjecture. No hostile act is alleged, but merely, evidences an intent to assist an individual as distinguished from an intent to aid a country with which we are at war. Allegations of the crime of treason should not be construed so as to extend them to doubtful cases. Citing: *United States v. Robinson, 259 Fed. 685; Young v. United States, 97 U. S. 62; United States v. Werner, 247 Fed. 709; United States v. Herberger, 272 Fed. 290; 30 Federal Cases 18,272; Ex Parte Bollman, 8 U. S. 75; United States v. Schaefer, 251 U. S. 482.*

II. All of the overt acts alleged in the indictment were acts of aid to an individual that do not constitute acts of treason. A verdict should have been directed of not guilty on the motion of defendant for failure to prove aid and comfort to an enemy of the United States. Citing: *United States v. Fricke, 259 Fed. 673; United States v. Werner, 247 Fed. 708.*

III. The whole testimony of the witness Krug should have been stricken, for he was not a competent witness. He was a confessed adherent to the Nazi ideology which has as its tenet that it is proper to lie and perjure one's self with reference to "inferior" peoples to gain Nazi ends. He would not swear, and there was no way in which the court could compel him to answer questions, nor to adhere to the truth. He refused to answer most of the questions put on cross-examination—very pertinent questions, effectively depriving defendant of the

fundamental right of cross-examination. The court could not discipline him. Krug presumptively did not regard the sanctity of an oath. Though he was not shown to have been convicted of any infamous crime, he did confess to forgery and larceny. For all of these reasons he was incompetent as a witness. Citing: *West v. Louisiana, 194 U. S. 258, 48 L. Ed. 965; Glasser v. United States, 86 L. Ed. 405; United States v. Robinson, 259 Fed. 69; United States v. Reid, 12 Howard 361; Logan v. United States, 144 U. S. 263; United States v. Black, 24 Fed. Case No. 14,609; 5 Jones Commentaries on Evidence (1st Ed.) 842; Adgine v. Ch. Hosp., 261 U. S. 525; Wigmore on Evidence (3d Ed.), Paragraphs 1390, 1391; Eng. Bushel v. Barrett, R. & M. 438, 21 ECL 790; Reg. v. Webb, 11 Cox C. C. 133; 7 Comyns Dig. p. 447; Eng. In re Ville de Varsovie, 2 Dods. 174, 16 C. J. 60; Webb v. State, 29 Oh. St. 351; Rex v. Priddle, 2 Leach C. C. 496; Eden Prin. P. L. C. 7, Sec. 5; Pendock v. Mackinder, Willes 665; Gilb. Ev. 143; 2 Hawk C. 46, Sec. 102; The King v. Priddle, 1 Leach (4th Ed.) 442.*

IV. The presence of the witness Krug in court and on the witness stand in full uniform of an officer of the German Luftwaffe, together with the testimony of irrelevant and prejudicial matters, such as a purported conversation between Krug about a German officer named Von Werra who allegedly had been furnished bail by the German Consul and had escaped to Germany to rejoin the air force, such as Krug's visit to, and an act of immorality with a lewd woman while in Detroit, his statements and innocent articles in his possession, six weeks after the alleged crime was committed, all so incited prejudice that a fair trial was impossible. Citing: *United States v. Bollman, 8 U. S. 75; United States v. Ogden, 105 Fed. 371; Mattox v. United States, 146 U. S. 140; McKibben v. Railway Company, 251 Fed. 577; Todd v.*

United States, 221 Fed. 209, and cases cited; Sprinkle v. United States, 150 U. S. 59, and cases cited.

V. The testimony of Krug should have been stricken in its entirety because of his refusal to submit to cross-examination. He barred counsel for defendant from legitimate inquiry regarding his intentions with reference to getting back to Germany and ability to get there, thus reflecting directly on the question of whether defendant's acts were giving aid and comfort to the enemy, and also from practically all legitimate subjects of cross-examination. This resulted in incurable and patent prejudice to defendant, because Krug was the Government's principle witness, and the subjects that might have been the basis of cross-examination went to the heart of the charge brought. Citing: *Adgine v. Ch. Hosp., 261 U. S. 525; 5 Jones Commentaries on Evidence (1st Ed.) 642; Wigmore on Evidence (3d Ed.), paragraphs 1390, 1391.*

VI. Nowhere in its charge did the court define treason, nor explain its elements adequately and clearly, and the jury received no knowledge of the legal requirements as to what the prosecution had to prove. Citing: *Const. Art. 3, Sec. 3, Cl. 1; R. S., Sec. 5331; Mar. 4 1909, C. 321, Sec. 1, 35 Sta. 1088; U. S. C., Title 18, C. 1, Sec. 1; United States v. Burr, 25 Fed. Cas. 14692, 14693; United States v. Greiner, 26 Fed. Cas. 15262; 30 Fed. Cas. Nos. 18271, 18272; United States v. Fricke, 259 Fed. 673; United States v. Robinson, 259 Fed. 685.*

VII. The motion for a directed verdict of not guilty should have been granted, because there was a variance between the indictment and proof, and no evidence, attested by two witnesses of any overt act of treason, and no evidence of treason. Citing: *United States v. Seymour, 50 Fed. (2d) 930; United States v. Werner, 247 Fed. 708; United States v. Bollman, 8 U. S. 75; United*

States v. Robinson 259, Fed. 691; United States v. Burr, Fed. Cases No. 14693; Sprinkle v. United States, 150 U. S. 56.

VIII. A mistrial should be declared because of the intemperate remarks made by the District Attorney in his argument.

He alluded to defendant in a derogatory and inflammatory manner, commenting on his failure to produce witnesses, and to testify himself. Citing: *Meriber v. United States, 85 Fed. (2d) 425, and cases cited; Hilliard v. United States, 121 Fed. (2nd) 992; and cases cited; United States v. Nettl, 121 Fed. (2d) 927; McKurglet v. United States, 115 Fed. 982; Mayer v. United States, 259 Fed. 216; Weathers v. United States, 117 Fed. (2d) 585; Pierce v. United States, 86 F. (2d) 949; Towbin v. United States, 93 Fed. (2d) 861; Wilson v. United States, 149 U. S. 60; Milton v. United States, 110 Fed. (2d) 556; Berger v. United States, 295 U. S. 88; U. S. C., Title 28, Ch. 17, Sec. 632.*

IX. Defendant was prejudiced when the court, in its charge, for the first time in the trial, injected the phrase, "a secret agent for, spy for and secret representative of Germany in the furthering and carrying on its war against the United States," the same being inflammatory, unsupported by any proofs, and contrary to proofs. Citing: *Miller v. United States, 120 Fed. (2d) 973; Boadright v. United States, 105 Fed. (2d) 737; Coale v. United States, 18 Fed. (2d) 50; Stokes v. United States, 264 Fed. 18; Cline v. United States, 20 Fed. (2d) 494; Hurwitz v. United States, 299 Fed. 449; Weare v. United States, 1 Fed. (2d) 617.*

X. Error is claimed because the jury separated each noon and were liberated each night to return the following day. They were continually exposed to hostile public

sentiment, detailed daily newspaper accounts and radio comments, and were not protected from outside influences. Citing: *Stone v. United States, 113 Fed. (2d) 70; Klose v. United States, 49 Fed. (2d) 177; Mattox v. United States, 146 U. S. 140; Griffin v. United States, 295 Fed. 439; United States v. Marrin, 159 Fed. 767; Affirmed in 167 Fed. 951; Meyer v. Cadawalader, 49 Fed. 32; Simmons v. United States, 142 U. S. 148; Harrison v. United States, 200 Fed. 669.*

XI. The Sentence is invalid because it is shockingly and horribly disproportionate to the acts complained of. Citing: *Ex Parte Watkins, 7 Peters (U. S.) 568, 8 L. Ed. 786 42 (L. R. A., N. S.) 978 Ann. Cas. 1914A, 1248; 16 C. J. 1351, Footnote 46.*

For a series of kindly benevolent acts totally lacking rancor, hostility, hatred or any display of antagonism to this Country, the jury found the defendant guilty of treason after listening to an extremely lengthy charge. More than one month later, after conferring with probation officers and special F. B. I. agents, who brought to the court in chambers the entire personal history of the defendant, the court then pronounced the sentence of death.

The overt acts by no stretch of the imagination, standing alone or collectively, could be considered criminal in their nature, but even if so, could not rise above the dignity of a misdemeanor. It follows, therefore, that the sentence pronounced was not based upon the finding of guilt on the part of the jury but upon those extraneous matters injected subsequent to the verdict, resulting in a punishment far out of proportion. Punishment for any crime should be an attempt to reform the offender and set an example deterring others from committing similar offenses, the ultimate aim being the protection of society. The severity of the sentence passed, this petitioner claims, was a gross miscarriage of justice.

ARGUMENT.

I.

The Overt Acts Alleged In the Indictment Do Not Set Out a Valid Cause Of Action As None Of the Acts Standing Alone Or Tacked Together Constitute the Crime Of Treason By Adhering To, Giving Aid and Comfort To An Enemy Country.

Without going into the mechanics of an indictment, its formal requisites and prominent features, petitioner urges that every indictment, to be sufficient, must have embodied within it, and alleged with certainty and precision allegations of such overt acts which standing alone or tacked together constitute a crime against the Government.

The overt acts alleged in the indictment (R. 1-6) in the instant case do not set out a valid cause of action.

> "An overt act is one which manifests a criminal intention and tends toward the accomplishment of the criminal object." *United States v. Robinson, 259 Fed. 685.*

> "It must be of a character susceptible of clear proof and not resting in mere inference or conjecture." *30 Fed. Cases 18,272.*

Any act distasteful to group opinion might well be constructed into a criminal allegation in an indictment and yet not be in violation of law.

The mere fact that the body of an indictment alleges certain acts, and the form of the indictment be sufficient will not elevate an otherwise innocent act to the dignity of an overt act manifesting criminal intent tending toward the completion of a criminal objective.

The indictment in the instant case alleges that petitioner

> "during the 18th and 19th days of April, A. D. 1942, unlawfully, feloniously, wilfully, traitorously and treasonably adhere to one Hans Peter Krug, a secret agent and spy for, and a secret representative of the Government of Germany in the furthering and carrying on of its war against the United States * * *."

The Circuit Court of Appeals, Sixth Circuit, decided on February 6, A. D. 1943, that this indictment was sufficient, declaring that (page 16 Opinion):

> "It distinctly and clearly alleges each and every element of the offense necessary to be charged, including time, place and circumstances, and advised appellant of the charge he was required to meet, to-wit, that he had unlawfully, feloniously, traitorously, treasonably, knowingly, and intentionally adhered to and given aid and comfort to Peter Krug, an enemy of the United States, and in furtherance thereof had committed certain overt and manifest acts. These alleged overt acts, twelve in number, were set out in the indictment with exact and careful detail."

All that aside, petitioner respectfully submits that exactness and careful detail together with all the mechanics necessary to conform to the proper drawing of an indictment will not give the color of criminal intent to otherwise wholly innocent acts.

Quoting the United States Circuit Court of Appeals, Sixth Circuit, in its affirmance of the instant case, the court said:

> "We must keep in mind that one may not be convicted of treason upon evidence of an overt act, unless such act has been laid in the indictment. *Burrs Trial, Fed. Cas. No. 14,693, 25 Fed. Cas. p. 55; Whartons Crim. Law, 11th Ed., Vol. 3, Sec. 2153, p. 2310.* Further, although not explicitly set forth in either the constitution or statutory provisions, an intent to give aid and comfort to the enemy is an essential element of the crime of treason. *United States v. Werner, 247 Fed. 708, 709 (D. C.); United States v. Fricke, 259 Fed. 673, 676 (D. C.) cf; United States v. Burr, 25 Fed. Cas. No. 14,692 h, 52, 54 (C. C.) United States v. Burr, 25 Fed. Cas. No. 14,693, 55, 90 (C. C.);* see *United States v. Robinson, supra.* Without an intent to give aid and comfort to the enemy there is no treason. *Wimmer v. United States, 264 Fed. 11 (C. C. A. 6).*"

> "But there may be aid and comfort without treason." *Young v. United States, 97 U. S. 62.*

> "It is conceivable that a defendant may have this condemned attitude of mind or be what is deemed 'traitor at heart' and yet not expose himself to treason because he has created no hostile act." *United States v. Werner, 247 Fed. 709.*

> "In order to constitute treason the accused must in general be guilty of some act which has for its direct aim the furtherance of the hostile designs of the enemy while the state of war exists, which act involves a want of loyalty." *United States v. Herberger, 272 Fed. 290, quoting 30 Fed. Cas. No. 18,272.*

Diligent search of the cases indicate that the courts have experienced some difficulty in specifying the pre-

cise acts which constitute overt acts of treason against the United States by adhering to their enemies, giving them aid and comfort; but in all of the decisions, it is clearly indicated that such acts of adherence and the giving of aid and comfort must be hostile and disloyal acts directly in furtherance of the hostile designs of the enemy, and, if successful, would advance the interests of the enemy, and weaken or tend to weaken the power of the Government to resist or attack its enemies.

> "The intent in giving aid and comfort to the enemies must be to tender such assistance to the enemy of the Government, and not merely to assist another as an individual." *30 Fed. Cases No. 18,270; United States v. Fricke, 259 Fed. 673.*

The hiatus between misprision and actual participation in a criminal conspiracy to commit treason is vast.

In *United States v. Burr, 25 Fed. Cas. 14,693, et seq.*, Marshall, C. J., said:

> "As this is the most atrocious offense which can be committed against the political body so it is the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosom of contending parties struggling for power."

Carefully measured and scrutinized in the light of the facts in the *Burr cases*, and all subsequent cases in our country's history wherein treason was charged, the acts alleged as overt acts in the indictment in the instant case pale into insignificance. Petitioner respectfully submits that there is no overt act of treason alleged in the indictment; that no amount of testimony to such acts

could elevate one or all of them to the dignity of a crime against the United States; that none of the acts standing alone nor all of them tacked together constitute a valid cause of action for treason against the United States of America.

> "The crime of treason should not be extended by construction to doubtful cases." *Ex Parte Bollman, 8 U. S. 75, United States v. Schaefer, 251 U. S. 482.*
>
> "This high crime consists of overt acts, which must be proved by two witnesses or by the confession of the party in open court." *United States v. Burr, 25 Fed. Cas. No. 14,692.*

The Circuit Court of Appeals passed over the question of what constitutes an overt act of treason, and considered only the question of two witnesses testifying to the same overt act alleged in the indictment.

Petitioner respectfully submits that an indictment must allege with precision and certainty such overt acts which constitute a crime, and any other allegation cannot have the effect of making a mere trespass into a public offense.

II.

Petitioner Avers That Giving Aid and Comfort For the Sole Benefit Of An Individual, Without the Evil Motive and Intent To Adhere To and Give Aid and Comfort To the Enemy Country In Furtherance Of the Hostile Designs Of the Enemy, Is Not Treason.

The crime of treason embraces the existence of an evil motive and the resolve and intent to commit overt acts directly in furtherance of the hostile designs of the enemy country.

> "In determining whether defendant is guilty of adhering to, and giving aid and comfort the question of intent is a vital ingredient of the crime; and though he assisted an enemy alien, whom he knew to be such, he is not guilty where he intended merely to assist him as an individual, and not to give aid and comfort to enemies of the United States." *United States v. Fricke, 259 Fed. 673.*

The court in the *Werner case*, said:

> "It is conceivable that a defendant may have this condemned attitude of mind or be what is termed a 'traitor at heart,' and yet not expose himself to the charge of legal treason because he has committed no traitorous act." "It is also conceivable that one under the domination of folly or of factional feeling or directed by a perverted view of what he is doing, or even a wrong-headed conscience, may do what would otherwise be traitorous acts, and yet not expose himself to that charge because the acts, although carrying all the consequences of traitorous acts, were done without traitorous purposes or intent. Such a

man plays the part of a traitor, but is not a traitor at heart." *United States v. Werner, 247 Fed. 708.*

None of the evidence adduced at the trial showed a hostile scheme, motive or evil intent to subvert the Government of the United States or to adhere to and give aid and comfort to the enemy country.

Each and all of the twelve overt acts layed in the indictment (R. 2-6) were acts of aid and comfort for the sole benefit of an individual, all of them were devoid of the color of aid and comfort to the enemy country. Further proof that the defendant had no intent to aid the enemy country is found in the record (R. 37-38) which definitely and unequivocally shows Krug to have been a prisoner of war for twenty months (August 28, 1940 to April, 1942); that he had no possible connection or contact with Germany except through the Swiss Consul (R. 111) and could not have been, and was not, a spy for, secret agent, or secret representative for Germany, and had no thought to injure the United States (R. 108, 109).

III.

Krug, An Officer In the German Luftwaffe, Adhering To the Nazi Philosophy, Wholly Devoid Of Moral Principle, With Such Disregard Of the Obligation and Sanctity Of An Oath Or Affirmation Was To Bar Him From Giving Evidence In a Capital Case In a Federal Court Of the United States.

The Circuit Court of Appeals in its decision in the instant case on February 6, 1943, affirming the conviction of this petitioner stated:

"Appellant contends that because Krug was an officer in the German Luftwaffe and an adherent to

Nazi principles, he was therefore so infamous as to bar him from giving testimony and that the court should not have permitted him to testify. This proposition was not raised at the trial and was probably waived by appellant's cross-examination of Krug. However, we think it not improper to discuss it briefly."

"It is said that Krug was incompetent as a witness under the laws of Michigan and that the Federal Courts are bound thereby. Granted that this was the old rule, an important exception has been engrafted upon it. In *Funk v. United States, 290 U. S. 371,* the court said in substance that in criminal cases Federal Courts are not bound by such rules, but that in the development of truth they are to apply them as they have been modified by changed conditions. But all this to one side, we have been cited to no law of Michigan or decision of any Federal Court, that a German Army officer, although imbued with Naziism, is disqualified to give evidence in a court of justice and we make no such decision now."

Relying upon the rights of persons as guaranteed in the Constitution of the United States Amendment 6, petitioner respectfully submits that the right to be confronted by the witnesses against him guarantees the right to be confronted by *competent witnesses* and that "competency" as applied to witness involves both capacity and qualifications, and imports existence of all essentials to render him fit to testify.

"The right of a defendant to be confronted by the witnesses against him has been held to be a fundamental right." *West v. Louisiana, 194 U. S. 258, 48 L. Ed. 965.*

It cannot be said that a sworn enemy of the United States, an officer of the abhorrent Nazi Army, brought

into the jurisdiction of a Federal Court against his will and imbued with the philosophy of hatred and violence, and devoid of decency and morality as measured by civilized standards can be escorted in military custody of a foreign power to a witness stand in an American Court and then and there confront the accused, as a prosecuting witness, with no rule of law to prevent him from testifying against an American citizen.

Every accused having the Constitutional right to counsel must rely wholly on his counsel. If the failure of such counsel to raise proper and timely objection incurably waived an inviolable right of the defendant whose life and liberty was in jeopardy, depriving him of his substantial rights, such a rule would be repugnant to American justice and contrary to all substantial rights guaranteed in the Constitution.

Petitioner respectfully submits that the Honorable District Judge erred in permitting witness Krug to testify relying wholly on a rule of procedure which must be abrogated by the same changing conditions relied on in *Funk v. United States, 290 U. S. 371*, and cited by the Honorable Circuit Court of Appeals.

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." *Aetna Ins. Company v. Kennedy, 301 U. S. 389, 81 L. Ed. 1177, 57 Sup. Ct. 809; Ohio Bell Telephone Company v. Public Utilities Commission, 301 U. S. 292, 81 L. Ed. 1093, 57 Sup. Ct. 724; Glasser v. United States, 86 L. Ed. 405 (412).*
>
> "Federal appellate courts, will, in the exercise of a sound discretion, notice error in the trial of a criminal case, although the question was not properly

raised by objections below, where the refusal to review would shock the judicial conscience." *Weems v. United States, 217, U. S. 349, 30 S. Ct. 544; Oppenheim v. United States, 241 Fed. 625, 154 C. C. A. 283; Savage v. United States, 213 Fed. 31, 130 C. C. A. 1; Pettine v. New Mexico, 201 Fed. 489, 119 C. C. A. 581; Miller v. United States, 38 App. (D. C.) 361; Keliber v. United States, 193 Fed. 8, 114 C. C. A. 128; Dunn v. United States, 238 Fed. 508, 151 C. C. A. 444.*

The Appellate Court further says:

"When a witness takes the stand to testify, the law presumes that he is a competent witness and incompetency must be shown by the party objecting to him. *Wharton on Criminal Ev., 10th Edition, Vol. 1, Sec. 358, p. 721.*"

Does the court then mean that the error cannot be considered, it not having been raised at the trial?

"There is a well recognized exception to the general rule (passing on sufficiency of evidence not challenged in trial court) that, in criminal cases, involving the life or the liberty of the accused, the appellate courts of the United States may notice and correct plain errors in the trial of the accused which appear to have seriously prejudiced his rights, although these errors were not challenged or reserved by objections, motions, exceptions or assignments of error." *Kelly v. United States, 76 Fed. (2d) 847; 122 Fed. (2d) 461.*

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." *DeJianne v. United States, 282 Fed. 739.*

Witness Krug could not have been sworn at all in any reasonable sense, or in contemplation of law, nor could he attain the status of a competent witness by affirmation (R. 52).

> "Krug: 'I can't swear under foreign law, because I am a military man.' The Court: 'Then you may affirm. Our generous laws permit a witness either to take an oath or to affirm' (R. 51-52). 'I will permit you to affirm; but you are bound by the same law and penalties of perjury just the same as if an oath was taken.' Krug: 'I don't swear' (R. 52). The Court: 'Use the word affirm.' Krug: 'Affirm; yes, sir.'"

Petitioner respectfully submits that in the ceremony of swearing of a witness, to be effective at all, it is necessary that he understand and affirm the meaning of it without equivocation or mental reservation, prompted by a belief in the existence of a God and in reward and punishment. Otherwise his oath or affirmation could not bind him in conscience to the truth and nothing but the truth. An adherent to the Nazi regime and an exponent of its vicious philosophy cannot be said to bind himself in conscience by the mere holding up of his hand and nodding his head, knowing that by so doing he incurred no risk of punishment. He had no more bound himself than if he were of unsound mind.

> "The competency of a witness in a capital case is to be measured by the doctrine, when evidence is estimated quantatively, it is the support of the oath that counts." *United States v. Robinson, 259 Fed. 691.*

The *Funk case (Funk v. United States, 290 U. S. 371)* is not in point in the instant case and should not

overshadow the reasoning in and reliance placed on the long line of cases that come down to us from *United States v. Reid, 12 Howard 361, 363, 364, 366.*

The Circuit Court of Appeals in the instant case said:

> "Granted that this was the old rule an important exception has been engrafted upon it. In *Funk v. United States, 290 U. S. 371,* the court said in substance that in criminal cases federal courts are not bound by such rules but that in the development of truth they are to apply them as they have been modified by changed conditions."

Is it to be accepted as the rule now that truth has changed under the changing conditions set out in the *Funk case?* Petitioner urges that the *Reid case* is the ruling case established by *United States v. Reid, 12 Howard 361,* and sustained by *Logan v. United States, 144 U. S. 263, 309,* and the long line of cases which have sustained the *Reid case.* It was said by Chief Justice Taney in that case:

> "But it could not be supposed without very plain words to show it, that Congress intended to give to the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design of this act of Congress. The law by which, in the opinion of this court, the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789. The courts of the United States have uniformly acted upon this construction of these acts of Congress, and it has thus been sanctioned by a practice of sixty years."

Petitioner urges that witness Krug was infamous in the highest degree and was incompetent to testify in a criminal case in a federal court of the United States of America.

In *United States v. Black, 24 Fed. Cas. No. 14,609, 4 Sawy 211,* it was said:

> "the exclusion is on the theory that a person would not commit a crime of such heinous character, unless he was so depraved as to be altogether insensible to the obligation of an oath, and therefore was unworthy of credit."

At common law a person is incompetent as a witness if he has been convicted of an infamous crime.

> "The basis of the rule seems to be that such a person is morally too corrupt to be trusted to testify; so reckless of the distinction between truth and falsehood, and insensible to the restraining force of an oath, as to render it extremely improbable that he will speak the truth at all." *70 C. J. p. 105, fn. 23.*

An infamous crime is one which works infamy in the person who commits it. At common law it was one which involved moral turpitude and which rendered the party convicted thereof, incompetent as a witness. *(Eng. Bushel v. Barrett, R. & M. 438, 21 ECL 790).*

The crimes which the common law regarded as infamous because of their moral turpitude were treason, felony, perjury, forgery, and those other offenses classified generally are *crimen falsi* which impressed upon their perpetrator such a moral taint that to permit him to testify in legal proceedings would injuriously affect the pub-

lic administration of justice. Citing: *Bushel v. Barrett, supra;* and *Reg. v. Webb, 11 Cox C. C. 133; 7 Comyns Dig. p. 447.*

The term "*crimen falsi*" in the common law is applied to crimes which disqualify a person as a witness. *(Eng. In re Ville de Varsovie, 2 Dods. 174) 16 C. J. 60.* The definition *(crimen falsi)* affords no accurate guide * * * but it includes perjury, subornation, suppression by bribery, forgery of instruments, * * * etc. Citing: *In re Ville, supra;* and *Webb v. State, 29 Oh. St. 351; Rex v. Priddle, 2 Leach C. C. 496.*

Mr. Wm. Eden (afterwards Lord Auckland) in his *Principles of Penal Law,* which passed through three editions in England and at least one in Ireland within six years before the Declaration of Independence, observed: "There are two kinds of infamy: The one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent." *Eden Prin. P. L. C. 7, Sec. 5.* At that time it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime, and not upon the nature of his punishment. *Pendock v. Mackinder, Willes 665; Gilb. Ev. 143; 2 Hawk C. 46, Sec. 102. The King v. Priddle, 1 Leach (4th Ed.) 442.*

Cited *In re Wilson, 114 U. S. 417,* is the following:

> "and those convicted of perjury or subornation of perjury besides being fined and imprisoned, were to stand in the pillary for one hour, and rendered incapable of testifying in any court in the United States." *Act April 30, 1790, C. 9 (1 St. 112-117); Mr. Justice Wilson's Charge to the Grand Jury in 1791, 3 Wilson's Works, 380-381.*

It is well settled in law that the competency of witnesses in a criminal trial in a Federal Court must be determined by the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789. (Act Sept. 24, 1789, c. 21, Stat. 73).

In reversing the decision of the lower court, it is said in *Maxey v. United States, 207 Fed. (2nd) 327:*

> "It is urged in the brief of counsel for the United States that Congress has passed no law making the conviction of crime a disqualification. This is an erroneous view to take of the matter. The common law prevails until Congress shall decide otherwise."

The *Funk case* ends by saying:

> "It is plain enough that the ultimate doctrine announced is that, in the taking of testimony in criminal cases, the federal courts are bound by the rules of the common law as they existed at a definitely specified time in the respective states, unless Congress has otherwise provided."

In the *Scaffidi v. United States, 37 F. (2nd) 203, 207, 208,* the court adopted the language used in *United States v. Reid, supra:*

> "The rules of evidence in criminal cases, are the rules which were in force in the respective states when the Judiciary Act of 1789 was passed. Congress may certainly change it whenever they think proper, within the limits of the Constitution. But no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in criminal cases * * * in federal court." *United States v. Hall*

(D. C.) 53 F. 352; United States v. Hughes (D. C.), 175 F. 238; Denning v. United States (C. C. A.) 247 F. 463; Parker v. United States (C. C. A.), 3 F. (2nd) 903.

The next pertinent question is, what was the law of Michigan in 1789?

"The territory comprising the state of Michigan continued under British jurisdiction until July, 1796, and the Ordinance of 1787 was not in full effect as to such territory until after that time. Before that time the territory in civil matters, was governed by French law including the custom of Paris as modified by royal edicts. The French laws, as well as the English, Canadian, Northwestern Territory and Indiana Statutes were repealed in 1810. *1 Terr. Laws 900.*

"The Ordinance of 1787, for the Government of the territory northwest of the Ohio River, is no part of the fundamental law of the state since its admission into the Union. It was superseded by the State Constitution; and such parts of it as are not to be found in the Federal or State Constitution were then annulled. It was superseded by the Federal Constitution—but was revived and continued in force, with modifications, by the act of Congress of Aug. 7, 1799, and was finally superseded, so far as repugnant, by the constitution of each state formed from territory governed by it." *Mich. Stat. Anno., Vol. 1, page 115.*

The Common Law prevailed during the Government of the Northwest Territory and the Act to divide the Indian Territory into two separate Governments, 2 Stat. 309: Approved January 11, 1805, made no change in the then existing Common Law which prohibited infamous persons from serving on juries or giving testimony in a court of law.

When Michigan Territory was admitted into the Union as a state [Laws of 1836, page 57, July 25, 1836], the "convention, began at the City of Detroit, on the second Monday of May, in the year one thousand eight hundred and thirty-five," the Constitution was drawn. The Constitution and the statutes adopted thereafter failed to remove the disability of infamous persons in criminal cases in Federal Courts as required by the settled law.

Tested by the chaotic conditions resulting from the devastating war now involving the world the philosophy and practices of the Nazi regime is raised to the level of the most heinous criminal philosophy in all history. If the doctrine of the *Funk case (Funk v. United States, 290 U. S. 371, 54 Sup. G. 212)* should prevail it would become enlarged to the point where all civil rights would be threatened.

> "That rule of the Common Law, which renders a person incompetent to give evidence in a court of justice who has been convicted of an infamous offense, is not the consequence of an artificial system, or a state of society peculiar to certain communities, but is founded in the constitution and nature of human associations generally, and is dictated by the necessity, universally felt, of maintaining the purity of the institutions through which justice is administered. A man who stands convicted of falsehood by a tribunal having corrupted jurisdiction of the offense, is deprived of the common presumption raised by law in favor of witnesses, that they will tell the truth; he can no longer be confided in, when he deposes to facts and circumstances affecting the rights of others, and therefore the law, that the stream of justice may not be polluted, will not suffer such a witness to be heard." *(State v. Chandler 10 N. C. 393, 397). (70 C. J. 107, fn. 23).*

It seems that in some of the settled cases that conviction must precede the incapacity of a witness, but can the civil rights of an American citizen be abrogated, and a representative of a foreign power be permitted to testify in a Federal Court of the United States without the disability of infamy because a conviction does not precede?

While Krug has not been convicted of any infamous crime he did confess to forgery (R. 98, 99) and theft (R. 88) both infamous crimes, on the witness stand.

It seems to us that the court cannot fail to attribute to any adherent to the Nazi ideology that infamy that necessarily renders him incompetent to testify in any court of justice. That ideology embraces the doctrine that all but the "Aryan" peoples are "inferior," that it is the ordained predestination of the Nazis to rule and direct them and hold them in bondage, that it is entirely proper, and indeed commendable, to lie, to perjure, or to commit any crime against these "inferior" peoples to gain the Nazi aims. That the Nazis are imbued with these loathsome doctrines, and that they act accordingly is so thoroughly established among our people that we have committed ourselves to a great and bloody war and to risk the lives and limbs of ten million of our young people to rid the world of it. How can any court say that it is not infamous, and that one who believes in it has the requisites of a competent witness?

IV.

The Presence Of Krug As a Witness, Attired In the Full Uniform Of An Officer Of the German Luftwaffe, Was Incurably Prejudicial To the Defendant; the Admission Of Incompetent, Irrelevant, Immaterial and Obscene Testimony, Part Of Which Was Stricken Too Late, Violated the Defendant's Substantial Rights and Denied Him a Fair and Impartial Trial.

The presence of Oberleutenant Krug, testifying in the full uniform of the hated Nazi government (R. 52-111) incited passion in the jury and so prejudiced the defendant's substantial rights that a fair and impartial trial was denied him.

Great caution and exceeding care must be exercised to preserve the rights of a defendant on the trial for treason. As appropriately set forth in the *Bollman case:*

> "In times like these, when the public mind is agitated, when wars and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of the court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby establish precedent, which may become the ready tool of factions in times most disastrous. The worst of precedents may be established from the best of motives. We ought to be on our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The Constitution was made for times of commotion. In the calm of peace and pros-

> perity, there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to raise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude." *United States v. Bollman, 8 U. S. 75.*

Our laws have most jealously surrounded every defendant with safety barriers to prevent any possibility of unfairness or prejudice from reaching the jury, thus depriving that defendant of a fair and just trial. That is a guaranteed right of a defendant and if such an effort were made in behalf of this petitioner and if the Honorable District Court had limited the extent of Krug's testimony, and had the jury been cautioned and instructed to disregard his person as a witness, nevertheless Krug's presence before them, in the full uniform of a Nazi flyer, was as prejudicial as an improper statement, that even if struck by the court would come under the following rule:

> "And the evidence maybe so highly prejudicial in its nature, that no instruction limiting the purpose for which it may be considered can cure the error." *Burge v. United States, 26 App. 524.*

The Von Werra matter (R. 70-73) was incompetent and prejudicial. There was no relation between the Von Werra matter and the instant case. The objection of the trial attorney (R. 71) was overruled. The court speaking on the objection (R. 71-72) said:

> "'I don't know what the other case is myself. Nothing has been said here to indicate what that case is.' Mr. Babcock (District Attorney) (R. 71): 'That's right.' The Court (R. 72): 'Well, I will overrule the objection, but unless it is connected up I will strike it out. You have to start somewhere.

> At the present time I agree, I don't understand myself what it has to do with this case, but I will admit it and we will see and if it isn't connected up and doesn't have anything to do with it, of course the jury could not use it and at the present time I don't understand it.' "

It has been said that a reversal may not be had for the admission of purely irrelevant hearsay evidence, but petitioner urges that the admission of the Von Werra matter under circumstances of great moment tended to prejudice the jury.

The Von Werra matter was incompetent, irrelevant, and extraneous to the issue; it referred to an interned German flyer who had escaped from an internment camp in Canada. The testimony (R. 70-73) referred to a large sum of money and by implication served to impugn a motive to the defendant. The testimony by Krug was hearsay (R. 72). The District Attorney (R. 71) stated that the government would connect the Von Werra matter with further evidence. The matter was not connected up and the court did not strike the testimony. Petitioner avers that prejudicial error occurred in admitting the testimony and the failure of the court to strike it.

> "It is the right of the defendant accused of the crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence, admitted according to law and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw the jurors and grant a new trial." *United States v. Ogden, 105 Fed. 371; Mattox v. United States, 146 U. S. 140, 150; McKibben v. Philadelphia and Reading Railway Company, 251 Fed. 577.*

Petitioner urges that the testimony of Alvina Ludlow (R. 185-186) and Ethel Merrifield (R. 190-194) was incompetent, irrelevant, immaterial and obscene. Admission of this lewd and obscene testimony

> "only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged." *Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. 392.* See also *Tootham v. United States, 203 Fed. 220.*

Petitioner avers that the lewd and obscene testimony (R. 185-186, 190-194) and the testimony of special agent Jack O. Parker (R. 201-208, 233) could not be rendered harmless, and reversible error cured by the court's general instructions directing the jury (R. 259-263) not to consider the evidence; because under these circumstances the government had already received the full benefit of the testimony, and the effect on the jury of inadmissible, prejudicial testimony, stricken too late, was carried with them and became a part of their deliberations, to the incurable prejudice of this petitioner.

When the court struck the testimony of Jack O. Parker (R. 259-263) the Honorable District Judge said:

> "I am not striking (R. 260) out the exhibits (Ex-

hibits 4, 9, 10, 12 and 13) (R. 366), the things found on the person of the defendant, I am letting all that stand. But it is the testimony given by the witness Jack O. Parker as to what the German soldier said."

This petitioner urges that all of these exhibits were erroneously admitted; that the introduction of a revolver and cartridges (Exhibits 12, 13) purchased by Krug in San Antonio, Texas, on May 31, 1942 (R. 96), six weeks after his departure from Detroit, was incompetent, irrelevant, immaterial and incurably prejudicial to the substantial rights of defendant, because it tended to mislead the jury and incite passion in their minds.

In *Todd v. United States* the Honorable Court said:

"But the legal presumption is that error produces prejudice. It is only when the fact so clearly appears to be beyond doubt that an error did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal can have effect."

"And this court is unable to determine from the record whether it was upon this inadmissible evidence, or upon other evidence in the record, that the jury based its verdict, and it cannot disregard the error." *Todd v. United States, 221 Fed. 209, 210* citing *Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653; Peck v. Heurich, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302; Railroad Company v. Holloway, 52 C. C. A. 260, 114 Fed. 458; Armour and Company v. Russell, 75 C. C. A. 416, 417, 144 Fed. 614, 615, 6 L. R. A. (N. S.) 662; Mutual Reserve Life Ins. Company v. Heidel, 161 Fed. 535, 539, 88 C. C. A. 447, 481.*

Petitioner avers that the trial court erred in permitting the introduction of Exhibits 12 (R. 203) and 13 (R. 204). These articles had no relation to the activities of Krug and the defendant in Detroit on April 18th and 19th, 1942. Petitioner submits further that the Greyhound Bus Map (Exhibit 9; R. 204) and the World Atlas (Exhibit 10; R. 204) were wholly incompetent, irrelevant and immaterial to the issue. The Greyhound map was gratuitously distributed by the Greyhound Bus Company to the public generally, available to any one at any time. The possession of these articles by Krug could in nowise pertain to the issue to prove an intent, or an overt act by defendant; their admission as evidence served only to cloud the issue and influence the jury to the incurable injury of the defendant's rights.

Petitioner urges that prejudice is presumed from the admission of all these exhibits and the testimony accompanying them and to substantiate the argument quote *Sprinkle v. United States:*

> "This is particularly true under the federal decisions applicable to the admission and exclusion of evidence, which are to the effect that it should be made to appear beyond a doubt that the improper evidence admitted did not and could not have prejudiced the rights of the party duly objecting." *Sprinkle v. United States, 150 U. S. 59,* citing therein *Deery v. Cray, 5 Wall. 795, 807, 18 L. Ed. 653; Gilmer v. Higley, 110 U. S. 47, 35 Sup. Ct. 471, 28 L. Ed. 62; Boston R. R. Company v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; United States v. Daubner (P. C.), 17 Fed. 793; Resurrection Gold Mining Company v. Fortune Gold Mining Company, 64 C. C. A. 180, 189, 129 Fed. 668; State v. Mikle, 81 N. C. 552; State v. Massey, 86 N. C.*

658, 41 Am. Rep. 478; State v. Jones, 93 N. C. 611; State v. Goodson, 107 N. C. 798, 12 S. E. 329; Bishop New Cr. Proc., Vol. 1, pages 89, 92, 93, also 1273, 1274, 1275, 1276, and cases cited.

Petitioner contends that Government Exhibit 17 (R. 222) should not have been admitted. The District Court erred in overruling the objection raised by trial counsel (R. 218) because the reading of the statement of the defendant (R. 222-226) could have misled the jury to the belief that the statement as read, was a confession; the trial court erred in not instructing the jury then and there (R. 219) that in order to convict on the charge of treason there must be a confession by the defendant in open court, as required by the Constitution, Art. 3, Sec. 3, Cl. 1, the trial attorney having brought it to the attention of the court (R. 219).

The Sixth Circuit Court of Appeals in affirming the instant case (decision Feb. 6, 1942, *Max Stephan v. United States, No. 9337, page 19)* said:

> "As indicated herein, on April 26, 1942, an officer of the Federal Bureau of Investigation took a written statement from appellant in the nature of a detrimental confession or admission, which statement was received in evidence late in the trial. It is nowhere claimed that the statement was not freely, voluntarily and understandingly made, but the proposition is pressed upon us that the court should have explained to the jury that it was not a 'confession in open court' [Constitution, Art. 3, Sec. 3, Cl. 1] upon which, standing alone, might be convicted. The contention is without weight, in view of the court's repeated emphasis in its instructions to the jury, that appellant could not be convicted except upon proof of intent, and proof that appellant

> did something to carry out that intent, that is to say, committed at least one overt act to be established by the testimony of two witnesses."

Petitioner in the brief filed in the Appellate Court [in *Max Stephan v. United States, No. 9337, p. 56*] in Argument VI, p. 56, said:

> "Pursuing the argument counsel submit that a statement in the nature of a confession to be admissible must be voluntary; that the statements should come from the defendant under such circumstances as shown them to be made of his own free will, with perfect knowledge of their nature and consequences, free from dictation, and without coercion, whether from fear of any threat of harm, promise or inducement by hope of reward, or method known as 'sweating.'
>
> "It is our contention that events occurring, from the time of defendant's detention to the signing of the statement, must have so agitated the mind of the defendant as to arouse his fear and to have a definitely coercive effect."

The admission of the statement by the trial court (R. 222) after overruling the objection (R. 219) was incurably prejudicial (R. 227-232).

Coupled with the testimony of special agent John Bugas of the Federal Bureau of Investigation together with the court's statement to the jury (R. 222) upon their return to the court,

> "*All I will tell the jury at the present time, for your information and all that I need to tell you is* that in your absence I have considered the *legal*

question as to the admissibility of Exhibit 17, which I will admit for the jury's consideration,"

the erroneously admitted statement had a strong tendency to prove defendant's guilt and this testimony and statement so (R. 227-232) prejudiced and inflamed the jury against the defendant as to prevent a fair and impartial trial. At no time later in the trial nor in the court's charge to the jury was the statement of petitioner referred to but was left for the jury's consideration as being legal, competent and relevant.

The court in the ***Fries case*** said:

> "I think that there ought to be great caution in receiving as evidence, a confession which any man makes himself, because it possibly might be obtained from him by artifice or intimidation." *United States v. Fries, 9 Fed. Cas. No. 5126, p. 914.*

Petitioner avers that it was error to admit the statement, because:

> "The evidence for the prosecution has consisted of the direct testimony of one witness to the alleged overt act, and of admissions made voluntarily by the accused party since his arrest. The Constitution provides that no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The admissions here proved were not such confessions, and upon the trial of an indictment, would not, in connection with the testimony of a single witness to the overt act suffice to warrant a conviction. But the provision of the Constitution and the language of the first section of the Act of April 30, 1790, on the subject, apply only to the trial of indictments."
> * * *

"This appears to have been the opinion of Chief Justice Marshall (1 Burr Tr. 196) and likewise of my judicial predecessor in this district." [*Charge to the Grand Jury*], *(2 Wall. Jr. 138)*.

"The intention of the framers of the Constitution must have been to restrain the application of the prescribed rules of evidence to the trial of the indictment. A person should not, however, be indicted or imprisoned under a charge of treason when there is no rational probability that the charge, if true, can be proved by two witnesses on the future trial." *26 Fed. Cas. No. 15,262, p. 40.*

V.

The Court Should Have Compelled Witness Krug To Answer, Or Struck His Entire Testimony When Krug Repeatedly Refused To Answer Proper Questions On Cross-Examination.

Petitioner urges that it is one of the elementary principles of cross-examination that the party having the right to cross-examine, has the right to draw out from the witness, and lay before the jury anything tending, or which may tend to contradict, weaken, modify or explain the testimony given on direct examination, or which tends or may tend to elucidate the testimony or affect the credibility of the witness.

Krug, the Government's chief witness, had testified freely on direct examination (R. 52-81), and followed leading questions and testified at length giving the prosecution the full benefit of such testimony. But on cross-examination he became recalcitrant under questioning

and refused to answer proper questioning despite the court's ruling (R. 82, 83). Repeatedly during cross-examination (R. 81, 82, 84, 87, 97) Krug refused to answer questions that tended to explain testimony given on direct examination.

Krug had placed himself beyond the power of the court to punish him (R. 82, 83) and petitioner urges that it was error when the court, on its own motion, failed to strike Krug's entire testimony and disqualify him as a witness.

> "Q. (Interrupting): All right. I now will ask you again how much money you had in your possession when you arrived in Detroit on the 18th of April, 1942? A. I can't tell you this because it is a military secret, and has nothing to do with the case, as far as I see it.
>
> The Court: Well, witness—
>
> A. (Interposing): Your honor.
>
> The Court (continuing): —it is my duty to interpret whether or not it has anything to do with this case. That is a matter of law, you see. A. Yes.
>
> The Court: And I will say that it does have to do with it. It is a proper question. That is my duty to do that. So if you don't want to answer that—I don't see how that can be myself any military secret, and it is a proper question. That isn't an improper question at all. A. I am sorry. I can't answer this question, because I can't tell Canadian officials if it is possible or if it is not possible for a prisoner of war to get some money, and if I tell it I had a lot of money with me then they know that in any way I got some money into the prison camp, and if I tell no, I had no money with me, then they know too that there is no way that the prisoner gets some money. Do you understand what I mean? So I can't answer his question.

The Court: I don't see that it is a military secret myself. I don't see it. A. I can't answer his question.

The Court: But I do pass on the other that it is a proper question and a relevant question, relevant to the direct examination. I think I have gone as far as I can for you. I have got an answer that you can use.

Mr. Amberson: Well, I think, if your honor grants it, we should have a ruling here.

The Court: How?

Mr. Amberson: I think we should have a ruling here at this time whether this witness, having submitted himself voluntarily as a witness in this case, stands on any different footing than any other witness who refuses to answer a question when the court rules that it is a proper question.

The Court: Well, not as a matter of law, but from a practical standpoint as a prisoner of war he stands in a very different situation. It is much the same situation as I once had with two witnesses who were serving a life term in Jackson prison that were before me, and I just didn't know what I could do. If anybody can tell me, why, I welcome the information."

The witness' refusal to answer pertinent, proper questions, fully and most efficiently blocked the efforts of the trial counsel.

It was error when the court, on its own motion, failed to strike Krug's entire testimony and disqualify him as a witness.

> "Judicial power is that power vested in courts to enable them to administer justice according to law." *Adgins v. Ch. Hosp., 261 U. S. 525, 544.*

> "Where the witness after his examination in chief on the stand, has refused to submit to cross-examination, the opportunity of thus probing and testing his statements had substantially failed, and his direct testimony should be struck out. On the circumstances of the case the refusal or evasion of answers to one or more questions only need not lead to this result." *Wigmore on Evidence (3rd Ed.), pars. 1390, 1391.*

The Honorable Appellate Court in its decision affirming the conviction of petitioner (p. 31 of opinion), said:

> "The record leaves no doubt that Krug had no intention of testifying to anything which might prove detrimental to appellant. He was probably influenced to some extent by a representation made to him by someone in the interest of the appellant 'that I stayed and testified against Stephan.' That such a representation was made is uncontradicted and its occurrence is unexplained. The record fails to show when, or where, or particularly by whom it was made to Krug whether during the noon recess or at some other time. Krug had been on the witness stand before the recess and his recollection that someone had approached him took place after his return to the witness stand in the afternoon."

Petitioner respectfully submits that there is a misconception of the face of the record set out in the wording of the Honorable Appellate Court's decision (p. 31 of the opinion). The "representation" referred to supra was brought out during the cross-examination of Krug and on re-direct examination, and not made by contact outside of the court room. Krug was under heavy guard at all times during the trial. See testimony infra.

Krug testified at length during the examination in chief (R. 52-81), freely and fully under the direction of the

Assistant District Attorney. During the cross-examination (R. 81-111) the trial attorney (R. 109) asked witness Krug:

"Q. Will you state to the jury then what your purpose is in coming here as an enemy of this country and testifying in this case against a man who is charged with treason against our country? What is your purpose, your object? A. The purpose is to clear out that he didn't do what he is charged with. I was only asked to tell the truth about the case and what is wrong, what FBI has charged him and all the other persons who are charged with having known who I am.

Mr. Amberson: Will you read that answer again? I couldn't follow it, Mr. Reporter.

(Answer read.)

Q. In other words, witness, if I understand your answer correctly, you feel now as a witness here that the defendant, Max Stephan, did not do the things that he is charged with here with doing, is that correct?

Mr. Lehr: If the court please, I object to that, what he feels. It is a highly improper question.

Mr. Babcock: The question calls entirely for a conclusion on the part of the witness, a very important conclusion which the jury must draw.

Mr. Lehr: He himself has testified to the facts that are charged in the indictment.

The Court: It would be entirely proper for counsel to ask him as to his motive. It is always proper on cross-examination to show the motive. Now you get around to where you try to show that his motive was only an unfriendly motive. Now, whether I should permit him, on the theory of showing a motive, to tell what isn't true, on the interpretation that permits this witness to say whether or not he thinks the defendant is guilty of the thing charged against him, I don't believe I ought to do that. You have got a right to show this man's motive, and I ought to give you full ground to do it, and I intend to. I

think I have. But I will go farther, because you are entitled to do that with this witness, to show every motive he has. But, you see, this goes around and asks him, 'What do you think about this chap? Do you think he is guilty or not guilty?' is about what it amounts to.

Mr. Amberson: I will withdraw it.

The Court: All right. I think, in showing the motive of a witness who testified against him, I ought to do that, and I want to do that, but I don't want him to interpret our laws in this testimony on the facts.

Q. (By Mr. Amberson, continuing): You have never seen Max Stephan before today since you left here on the 19th of April? A. Since I left him on the 19th of April, yes.

Q. You have never seen him? A. No.

Q. Never talked with him? A. No. I asked for it if I should be allowed to talk to him, but I wasn't allowed to.

Q. He is no relative of yours? A. No."

On re-direct examination Krug (R. 114) states the answer to the appellate court's question: "The record fails to show when or where, or particularly, by whom it was made to Krug."

The following colloquy ensued between the court and the witness (R. 114):

"The Court: Now, who made the statement that you are talking about? A. I didn't understand.

The Court: Who made the statement that you are answering about? Who said this? A. I myself.

The Court: You said it? A. Yes.

The Court: Now, which was nearer to you, Donay or Stephan? A. Donay.

The Court: Donay. How much nearer? A. Let's see. Maybe three-quarters or half a yard.

The Court: All right. A. I can't measure. Your honor, would you be good enough to answer a question? You see, I don't know what he is called.

The Court: How is that? I don't understand you.
A. The defender of Mr. Stephan told me that I stayed and testified against Stephan. If that is so, I will be relieved from further questioning.
The Court: Will you read what he said?
(Answer read.)
A. Because it is not the intention—it is not my—I don't intend to testify against Stephan. I was told by the FBI agents that I have only to clear out the facts and to tell the truth and nothing but the truth.
The Court: That is what you are sworn to do, and that is as far as I have to do with it. I have nothing to do with whom the testimony helps or who it harms. My only desire is that people tell the truth. That is what you took your affirmation to do, not oath but affirmation, to tell the truth, and so that is what I say to you you should do is tell the truth.
You may go ahead.
A. Yes. I have another objection. I asked the FBI agents that I never can testify against a man who helped me, but they told me about when I made this question that there is no testifying against him but it is only in statement of the facts he already has told.
The Court: Well, you see, it isn't my job to decide who is being helped or who is being harmed by testimony. My job is to see, if I can, that witnesses tell the truth. So that is all that I say to you, is tell the truth.
Go ahead with your questioning."

Petitioner respectfully urges that reversible error occurred in not striking the entire testimony. Krug's failure to answer on cross-examination incurably prejudiced the substantial rights of petitioner and denied him a fair and impartial trial.

> "Cross-examination on matters in issue or directly relevant to the issue is a matter of right. Its exclusion is error." *5 Jones Commentaries on Evidence (1st Ed.) 842.*

VI.

Petitioner Contends That the Government Having Failed To Prove An Overt Act Of Treason and Failed To Produce Two Witnesses To Any Same Overt Act, Constituting a Fatal Variance Between the Indictment and Proof, the Court Erred In Not Directing a Verdict For the Defendant.

In the case under discussion there are no two witnesses to any overt act (if there were one) in the furtherance of the hostile designs of the enemy country. Failing in this essential of establishing that clear proof required as a prerequisite, the court should have directed a verdict of not guilty at the close of the government's proof.

> "Treason requires two such witnesses to the overt act. It has on this account been necessary to produce DIRECT and it is not enough to produce CIRCUMSTANTIAL proof." *United States v. Robinson, 259 Fed. 691.*

The case at bar is infinitely weaker than the one provoking these words:

> "It is the right of the people and the defendant * * * that the guilt of the defendant shall be submitted to the jury as the lawfully constituted tribunal to pass upon it. This of course does not lessen the responsibility of prosecuting officers * * * that no defendant shall be unjustly harrassed by unfounded charges, NOR DOES IT RELIEVE THE TRIAL JUDGE OF THE DUTY of unflinching pronouncing judgment that the evidence is insufficient to convict, if such be the case, and of seeing to it

> that no man be unjustly convicted, if entitled to an acquittal under the facts and the law." *United States v. Werner, 247 Fed. 711.*

The instant case has one important characteristic similar to the *Robinson case,* i. e., each have but one witness on whom the principal charges (if they were treasonable acts) solely depend; in that case a man named Victorica, and in this Krug. There the learned Hon. Learned Hand aptly says in granting a directed verdict:

> "I conclude therefore, that it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits of the overt act together, but if so, each bit must have the support of two oaths." * * * "In the case of the overt acts at bar, was the necessary evidence produced. The gravamen of the charge depended for directed support on Victorcia alone. For the rest the case rested upon circumstantial evidence, which while well nigh conclusive, in fact, *was not direct as required.* There seems to me no question whatever, that without disregarding the whole theory of the constitution I could not allow a verdict to stand if I received it." *United States v. Robinson, 259 Fed. 691.*

If, therefore, the acts in the instant case could reach the dignity of acts of treason, the case at bar, being much the weaker, lacking many of the characteristics of the *Robinson case,* should end with a directed verdict of not guilty.

Petitioners contend that the motion for a directed verdict of not guilty made at the close of testimony should have been granted. No overt acts were proved and the Government could not rely on acts of Krug subsequent to his departure from Detroit. No testimony to

acts and declarations subsequent to overt acts charged can rank as evidence. This is well settled in law and as Chief Justice Marshall said:

> "On the trial for treason in levying war against the United States NO TESTIMONY RELATIVE TO THE CONDUCT OR DECLARATIONS OF THE PRISONER ELSEWHERE AND SUBSEQUENT TO THE OVERT ACT CHARGED, IS ADMISSIBLE, in the absence of proof of the overt act by two witnesses." *United States v. Burr (1807), F. Cas. No. 14693.*

Counsel contend that the weight of the evidence submitted at the trial of this petitioner, fell far short of supporting the verdict, and the following language could well have been adopted by the trial judge in making a disposition of the instant case:

> "The defendant, when placed on trial, was presumed to be innocent, and this presumption amounted to proof in his behalf, and could not be overcome until evidence was offered which was strong enough to satisfy the jury as to his guilt beyond a reasonable doubt, and the evidence being purely conjectural and speculative, I think it was the duty of the court to have instructed the jury that there was not sufficient legal evidence to justify them in returning a verdict of guilty, and that it should have directed a verdict of not guilty as to the defendant Angle." *Sprinkle v. United States, 150 Fed. 56, 63.*

A verdict should have been directed as moved by defendant.

VII.

The United States District Attorney, In His Closing Argument, Resorted To Intemperate, Improper Remarks, Repeatedly Referring To the Fact That No Witness Had Been Called By the Defense. The Contention Is That, By Resorting To Inference, Implication and Innuendo, Inciting Passion, the District Attorney's Remarks Constituted Palpably Incurable Error and a Mistrial Should Have Been Declared.

These being times of war when the passions and the feelings of the public runs high there is a greater duty on the court to guarantee to the defendant that fair trial the Constitution guarantees. When during the trial the district attorney makes unwarranted attacks on the defendant, all of which is calculated to arouse indignation in the jury; and by a continued tirade, arouses intense antagonism that is unwarranted, unnecessary and surely unconstitutional, such conduct warrants a reversal. This is especially true since the defendant, because of nationality, the war and the nature of the crime charged, was exceedingly unpopular.

It is only fitting and proper that all moral allowances be made for the excessive zeal and pride of success that compels the district attorney to obtain a conviction. Nevertheless, excesses which are carried too far are not allowable nor excusable, and from time immemorial our courts have bound themselves affirmatively to see that no injustice is done any accused by the improper course of a

prosecution, and when such officer does not keep within the legal bounds, a reversal is the only means to correct the wrong.

> "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Minker v. United States, 85 F. (2nd) 425. Judgment reversed.* Citing *Taliaferro v. United States, 47 F. (2nd) 699; Turk v. United States, 20 F. (2nd) 129; Sunderland v. United States, 99 F. (2nd) 202.*

The district attorney time and again asked the jurors to place themselves in the position of the defendant (R. 309-310). This is absolutely improper argument, for the duties of the jury is to listen to the testimony, the argument of counsel, the charge of the court, and when they retire for deliberation, to give the respondent the benefit of every reasonable doubt and not to place themselves in the position of using experiences of their own, or permitting their actions to be colored by their own feelings.

Time and again the district attorney made statements which were tended to mislead and did apparently mislead the jury. He said with definiteness and certainty (R. 303) that this is the kind of a case "where the death penalty would be absolutely unfair." This declaration on the part of the district attorney created an indelible impression that could not help but have tremendous weight in and guiding the jury in their verdict.

Times without number, statements were made that were untrue. When the district attorney attributes to Max Stephan all of the actions preceding the meeting of the war prisoner with the accused (R. 304), he knew he was absolutely wrong and he must have known it was improper argument, uttered only to inflame the jury into bringing in an improper verdict.

When he attributed friendship (R. 304) between the prisoner and the accused, he should have known that that was untrue, yet he persisted, with the deliberate intent and purpose to prejudice the jury.

When he referred to Lieutenant Krug giving a Nazi salute (R. 305), it refreshed the improper appearance of the lieutenant in his flier's uniform to the further prejudice of the accused's substantial rights.

> "To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense." *United States v. Nettl, 121 Fed. (2d) 927.*

It is a flagrant error to refer to the defendant's failure to take the stand (R. 305), and to say "Krug's statement stands on the record in this case, ladies and gentlemen of the jury, absolutely uncontradicted," from which statement the only inference that could be made was a reflection on the defendant for his failure to take the stand—he being the only one who could contradict Krug. The district attorney then said (R. 311):

> "This is Max's statement as introduced here. And to that Max made no comment."

He knew that the only person who could refute those statements was the defendant himself and calling attention to the fact that he did not take the stand, was incurable error and erroneously tended to prejudice the jury.

> "It is distinctly provided that a failure to testify should not create any presumption against the defendants." *McKnight v. United States, 115 Fed. 982.*

> "The fact that defendants did not see fit to take the stand and deny the charges made against them could not be allowed to raise in the minds of the jury any inference of guilt." *Mayer v. United States (C. C. A. Tenn. 1919), 259 F. 216.*

The statute U. S. C. A., Title 28, Ch. 17, Sec. 632 (Note 2) definitely precludes any such statement:

> "The provision in this section that the failure of defendant to exercise his privilege to become a witness 'shall not create a presumption against him' forbids all comment in the presence of the jury upon his omission to testify." *Williams v. United States (Ill. 1893), 13 S. Ct. 765, 149 U. S. 60, 37 L. Ed. 650; Reagan v. United States (Tex. 1895), 15 Sup. Ct. 610, 157 U. S. 301, 39 L. Ed. 709; McKnight v. United States (Ky. 1902), 115 F. 972, 54 C. C. A. 358; Green v. United States (C. C. A. Okla. 1920), 41 Sup. Ct. 449, 256 U. S. 689, 65 L. Ed. 1173.*

> "It is prejudicial error for the court or counsel to call to the attention of the jury in a criminal case in any manner, the right of the defendant, under the statute to testify in his own behalf * * *." See *McKnight v. United States (Ky. 1902), 115 F. 972.*

We think their one error alone is of such gravity that it compels a reversal of their case. This error is discussed exhaustively by the court in *Wilson v. United States, 149 U. S. 60, 13 Sup. Ct. 765 37 L. Ed. 650,* and in the state of Michigan by the case of *People v. Wessel, 256 Mich. 72.*

When the United States District Attorney made the statement (R. 316):

> "if these things Max Stephen had done for Krug had occurred before the 11th of last December, the time when Germany declared war on America, he would not be in here today, facing a charge of treason, because Krug at that time would not have been an enemy of the United States, because we were not at war,"

the district attorney well knew then, that Krug was a prisoner of war of Canada and therefore was not an enemy alien, for a prisoner of war becomes a political prisoner of the country where he is kept and ceases to be an enemy within the common meaning of the term:

> "Prisoners of war * * * shall be subject to the laws, regulations and orders in force in the army of the state into whose hands they have fallen." *American Journal of International Law, January, 1919, Vol. 13, page 98.*

The constantly repeated use of the words, "black-hearted traitor" (R. 306, 307), and "No, Max Stephan, you won't get away with it," and, repeated five times on one page (R. 269) of testimony incited the jury, and was so highly prejudicial that the wonder is not that they returned in eighty-five minutes but that they did not return in that many seconds.

In *Weathers v. United States, 117 F. (2d) 585,* the prosecuting attorney said someone had reached the witness and intimated she lied. The court said in reversing the trial judge:

> "The court did not reprimand the attorney for his line of argument nor direct the jury to disregard it. Moreover he did not comment upon it in his charge. The full force of this argument was left with the jury. * * * We are of the opinion that it was calculated to and did prejudice the rights of the defendant before the jury. It was the duty of the trial court to have promptly excluded this improper argument and directed the jury not to have considered it. Failing in this the court committed prejudicial error." *Berger Ward v. United States, 96 Fed. (2d) 189; Allen v. United States (9th Cir.), 115 F. 3; Maryland Casualty v. Reid, 76 F. (2d) 30.*

The district attorney's statement:

> "Well, if he (Amberson) knew anything about Lieutenant Krug or if he had that evidence to show that Lieutenant Krug was lying or was telling a falsehood on the stand, why in the name of Heaven didn't he bring some witnesses in here to contradict what Krug said,"

well knowing at the time of their utterance that the only person who could have refuted that statement was the defendant himself and it further exemplifies the deliberate attempt to point out the defendant's failure to take the stand in his own behalf.

When inflammatory remarks were repeatedly made to the jury in the following case the court said:

> "Indulgence was designed rather than inadvertent, and an improper purpose its only explanation. That

> it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so. * * * Above and beyond all technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the nation's courts as fair and impartial forums, where neither bias nor prejudice rules and appeals to passion find no place though the government itself be then a litigant. *Pierce v. United States, 86 F. (2nd) 949.*

The most cursory reading of the closing argument of the district attorney will show such extreme subtlety and blasting accusations, each standing alone appearing apparently harmless, but uttered in a continuity of thought, with the aid of gesture, voice and attitude, made a picture before the jury most prejudicial.

> "While there is perhaps no single instance involving error so prejudicial as to warrant reversal, we are convinced that, considered as a whole, the rights of the defendant were so prejudicial thereby as to deprive him of that fair and impartial trial which the Constitution and the law of the land accords to every citizen accused of the commission of crime." *Neufield v. United States, 118 F. (2nd) 393.* Citing *Egan v. United States, 52 App. (D. C.) 384, 397, 287 F. 958, 971.*

Subtle suggestions, references and innuendoes of a prejudicial nature, which have no basis of fact, are sometimes fatal to a fair trial and cannot be sanctioned. *Towbin v. United States, 93 F. 2nd, 861.*

> "In the trial of an accused person he may, at his own request, and not otherwise, be a competent witness." *Act of March 16, 1878, 20 Stat. 30, 28 U. S. C. A., Sect. 362.*

The statute which grants this provision also provided as early as 1893 that:

> "His failure to make such request shall not create any presumption against him." *Wilson v. United States, 149 U. S. 60.*

And the Supreme Court interpreted the language in this case as follows:

> "To prevent such presumption being created, comment, especially hostile comment, upon such failure must necessarily be excluded from the jury. The minds of the jurors can only remain unaffected from this circumstance by excluding all reference to it."

This principle has been applied in a number of later cases. (See *Note, 84 A. L. R. 784* and cases there cited) and its strict observance has been many times commended to prosecuting attorneys. In that case the district attorney used language which drew a comment from the court, by reason of which the following was said:

> "The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury and this defect should be corrected by setting the verdict aside and awarding a new trial." *Milton v. United States, 110 F. (2d) 556, 558.*

One of the leading cases outlining the status of a district attorney and his great responsibilities, reads:

> "The United States attorney * * * may prosecute with earnestness and vigor—indeed, he should do so—but, while he may strike hard blows, he is not at

> liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States, 295 U. S. 88, 89.*

It is urged here that the jury left the court room to enter upon their deliberations with the words of the United States District Attorney ringing in their ears:

> "NOW, I WANT YOU TO CARRY THAT WITH YOU WHEN YOU GO INTO YOUR JURY ROOM (R. 303), BECAUSE I CAN CONCEIVE OF A VERY AGGRAVATED CASE OF TREASON, WHERE A MAN WOULD DO SOMETHING THAT WOULD RESULT IN GREAT HARM AND INJURY AND DAMAGE TO HIS COUNTRY, WHERE ONLY THE DEATH PENALTY WOULD BE THE PROPER PENALTY TO BE INFLICTED AND THEN I CAN SEE OTHER CASES OF TREASON WHERE THE DAMAGE HAD NOT BEEN MUCH, BECAUSE IT WAS STOPPED IN TIME BEFORE IT WAS SUCCESSFULLY CARRIED OUT, **WHERE THE DEATH PENALTY WOULD BE ABSOLUTELY UNFAIR."**

These words uttered by the United States District Attorney, a highly important officer of the court, could not but lull the jurors into the feeling of false security that no matter what their verdict might be, no great and present danger confronted the accused; they were misled, as they might well have been, by the declaration that in such cases where the damage had not been great (because no real harm had been done to the United States), that the death penalty would not be inflicted. The statement of the learned counsel for the Government was indelibly impressed upon their minds, a fixation dominating their decision and their verdict to the incurable prejudice of the petitioner.

VIII.

Petitioner Urges That Harmful Error Occurred When the Court, In Its Charge, Failed To Definitely, Accurately and With Certainty Define An Overt Act Of Treason, and What Constitutes, "Adhering To, and Giving Aid and Comfort," To An Enemy Country In the Specific, Comprehensive Manner Made Mandatory By the Gravity Of the Crime Charged.

The crime of treason is of comparatively rare occurrence. With the exception of those well learned in history few people are aware of the elements necessary to complete the crime of treason, or have anything but the most vague idea of the legal definition of what constitutes a treasonable act against the United States.

Diligent search of the cases and careful study of the decisions fails to disclose a case where the elements of the crime of treason have been laid down in the degree that the elements of other crimes have been interpreted through a long line of legal interpretations and construction.

Treason is the most serious offense that may be committed against the United States, and its gravity is emphasized by the fact that it is the only crime defined by the Constitution. The Constitution defines treason as [Art. 3, Sec. 3, Cl. 1]: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." The statute upon which the indictment is based

(R. S., Sec. 5331; March 4, 1909, C. 321, Sec. 1, 35 Stat. 1088; U. S. C., Title 18, C. 1, Sec. 1) says:

> "Who ever owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort, within the United States or elsewhere, is guilty of treason."

It has remained for the courts to interpret what constitutes the "overt acts," and, from the cases reported, they have done so only with extreme caution and obvious reluctance to construct alleged acts of treason from high misdemeanors to the dignity of the high crime of treason. This is so in the *Burr Cases, 25 Fed. Cas. Nos. 14692, 14693; United States v. Griner, 26 Fed. Cas. No. 15262; 30 Fed. Cas. Nos. 18271, 18272; United States v. Fricke, 259 Fed. 673; United States v. Robinson, 259 Fed. 685.*

Petitioner respectfully submits that the jury could not of common knowledge be aware of any of the elements of the crime, regardless of an hundred facts placed before them in evidence, and unless they were clearly and comprehensively instructed by the court in its charge, they could not be expected to determine whether on the evidence treason had been committed by the defendant beyond a reasonable doubt, and apply the facts in reaching a proper verdict.

Petitioner is extremely reluctant to direct an assignment of error against the charge of the Honorable District Court in the instant case. The gravity of the sentence imposed and the extreme importance of this case to the people at large, compels petitioner to point out all errors fully.

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion

but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom." *Miller v. United States, 120 Fed. (2nd) 972.*

The Appellate Court in affirming this case said in its decision (p. 35 of the opinion):

> "Treason was exactly defined in the charge in accordance with both the Constitution and the statute, and the elements, 'overt act' and 'adhering to the enemy, giving them aid and comfort' were carefully set forth in accordance with applicable law."

The Appellate Court said that the elements of "overt act" and "adhering to the enemy, giving them aid and comfort" were carefully set forth in accordance with applicable law. Petitioner avers the total lack of interpretation of the meaning of the aforesaid terms in the line of cases decided, that it was incumbent upon the honorable trial court to have instructed more comprehensively in defining meanings of words.

Petitioner cites the following from the record to substantiate the charge of error. In the Charge (R. 332) the court said:

> "Now, I have told you in this way (R. 318-332) what the law is, and what the provisions are and what the charges are against the defendant, Max Stephan. In substance it is this. I think this is what constitutes the offense, is that at this time in question, on April 18 and April 19 of this very year, that we are at war with Germany. That is the charge that we are at war with Germany."

In defining "adhering to" the court said (R. 324):

> "As I say, illustrations are likely to mislead, but

> trying to find something similar where it says 'adhering' the thought came to me about the marriage ceremony that we hear the minister say, 'Forsaking all others and to her cling,' or something like that."

In constructing on intent (R. 334) the court said:

> "Intent is the meat of the crime, and it is the meat of this crime. And what is the intent? It is knowing that you are an American citizen, knowing that the United States is at war with Germany—if that is true, and those are facts for you. But I am telling you what would constitute the crime."

Again in speaking of "adhering to" (R. 335):

> "If one knows they are a citizen of the United States and they know that the United States is at war with Germany, they are charged with knowing that they owe their loyalty to the United States and that they do not owe it to the enemy. And if under those circumstances, knowing that they owe this loyalty to the United States, knowing that they should adhere to—'stick to' I guess is what it means, 'adhere' I don't know that sounds like sticking to. I know you should do that in time of war, stick to your own country, and give your aid and comfort to your own country and not to the enemy."

Every possible safeguard should have surrounded the trial to insure the impartial consideration of the facts, properly developed, and their bearing upon the question at issue been clearly understood by the jury. *Miller v. United States, 120 Fed. (2d) 972; Cook v. United States, 18 Fed. (2d) 50; Horwitz v. United States, 299 Fed. 449; Weare v. United States, 1 Fed. (2d) 617; Simon v. United States, 123 Fed. (2d) 80; United States v. B. Goedde & Company, 40 Fed. Supp. 523; Stakes v. United States, 264 Fed. 18.*

There were no exceptions to the court's charge. Petitioner respectfully urges that the charge (R. 318-341) was too long, and was interpolated by reference to matters wholly extraneous and in no wise related to a proper instruction to a jury on a trial for treason, and served only to confuse and mislead the jury as to the law on the facts and caused them to commence their deliberations without any clarity of thought as to the law, and while in a state of perplexity and confusion, pondered, to the prejudice of the defendant, constituting fatal error and denying defendant a fair and impartial trial.

Pertinent and lucid is *Boatright v. United States, 105 F. (2nd) 737*, where the court says:

> "In a criminal case in the Federal Court, the trial judge has the power to superintend and direct the trial, to review the evidence and to advise on the facts, but this power must not be abused * * *. The judge narrated material and important facts testified to by the government's witnesses and wove them into an argument that was clearly prejudicial. This we think requires a reversal." *Cook v. United States, 18 F. (2nd) 50; Stokes v. United States, 264 F. 18; Cline v. United States, 20 F. (2nd) 494; Hurwitz v. United States, 299 F. 449; Weare v. United States, 1 F. (2nd) 617.*

IX.

The Appellant Contends That Prejudicial Error Occurred When the Phrase, "A Secret Agent For, Spy For and Secret Representative Of Germany In the Furthering and Carrying On Of Its War Against the United States," Was Read From the Indictment By the Court In Its Charge, Although the Indictment Had Not Previously Been Read To the Jury On the Trial, Nor Had Any Testimony Been Adduced To Support That Allegation In the Indictment.

There is a specific duty imposed upon every Judge, sitting in a criminal case, to fulfil his obligation to the defendant. The moment a case starts, a mantle of protection covers the accused and:

> "the bars which guard the right to a fair trial, such as is guaranteed by our Constitution, include court procedure, rules of evidence, and proper instructions to the jury. These bars must not be lowered. To do so is to strike at the very foundation of our system of jurisprudence, which has for its ultimate goal, the preservation and protection of the liberty, and freedom of the individual citizen." *Miller v. United States, 120 Fed. (2nd) 973.*

The indictment had not been read to the jury at any time during the trial. The court in its charge read the indictment in its entirety, and the jury for the first time heard the words in the indictment.

Counsel contends that the court read the words:

> "Max Stephan * * * did adhere to an enemy of the United States, to-wit, one Peter Krug, a subject

> of the government of Germany, * * * A SECRET AGENT FOR, SPY FOR, AND SECRET REPRESENTATIVE OF SAID GOVERNMENT OF GERMANY, in the furthering and carrying on of its war against the United States."

and that prejudicial error was committed.

At no time during the trial had the words been mentioned; they were not the subject of any proof, nor was any evidence offered to substantiate the allegation set out in the body of the indictment. No attempt was made to cure, explain or rule out the phrase. They stood alone, an incurably prejudicial group of words which, coming from the court in its charge, had all the force and dignity the jury under their oath were required to heed.

In a recent case the court read the grand jury's averments in an indictment, and in reversing that judgment it said that the averments in an indictment preceding charge of conspiracy, setting forth obnoxious conditions, held improper and prejudicial to the defendants as tending to prevent a fair, impartial trial by jury, and allowed the motion to quash stating:

> "Inasmuch as any interested party may read the indictment to the jury and it may properly be submitted to that body for consideration at the conclusion of trial, it is apparent that this statement of condition which 'should never be countenanced in a free society' and which naturally tends to inspire in all law abiding people, resentment and righteous outrage, will tend to destroy that ideal of American jurisprudence, a fair impartial trial, as guaranteed by the Constitution. Such a trial should be surrounded by every reasonable safeguard to insure the

absence of any improper influence operating on the minds of the jurors, and to give to their verdict, that dignity, impartiality and respect so essential to the maintenance of a correct administration of justice." *United States v. B. Goedde & Company, 40 F. Supp. 523,* citing *Ogden v. United States, 112 F. 523.*

The designation of proof, here brought before the jury for the first time, was highly inflammatory and had no basis in any proofs whatsoever. In fact the proofs established its falsiity. It should have been stricken from the indictment, and its being read to the jury constitutes prejudice.

X.

The Jury Not Sequestered, But Permitted To Separate During the Entire Trial, Were Influenced To the Detriment Of the Defendant.

Error is claimed because the jury each noon separated and were liberated each day for the night to return the following day. They were continually exposed to hostile public sentiment, detailed daily newspaper accounts and radio comments, and were not protected from outside influences, thus becoming incurably prejudiced precluding any possibility of a fair trial.

At the outset of the case, the jury when finally selected were photographed and the names, addresses and such other information about each as to constitute a positive identification, was given.

In every edition the newspapers carried the proceedings of that day, and in typical newspaper manner, embelished with editorial comment, those accounts. Throughout each evening, when the jurors were free, radio broadcasts commented upon the then most important of all trials.

The Appellate Court's opinion on this phase of the claimed error said

> "there is nothing to indicate that the appellant was in the least prejudiced by the separation of the jury." [See p. 20 decision.]

Does the court attribute to this jury special qualities not found in other people? Is it assumed that by some unknown trait, they unlike any other people, would not look in the paper at their own pictures, would not read the accounts of the case that they listened to and would turn the radio dial when the commentator started to speak about the very subject matter they were an important part of that day? Or if they did not, can to them be attributed the quality of permanently erasing from their minds the impressions and influences reaching them?

The answer is contained in *Stone v. United States, 113 F. (2d) 70*, where this very court (6th Cir. Ct. of App.) in reversing the lower court, said:

> "There is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation."

> "Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained."

"Any course is clearly illegal which would expose them to the danger of influence outside the court. If a single juror is improperly influenced, the verdict is as unfair as if all were. The presumption is always in favor of good character but the law concerning juries provided strictly that all jurors be secluded from outside influences and presumes that such influence may act upon some of them, and may act so as to go beyond detection."

"The whole jury was exposed to, and actually encountered an outside influence."

The petitioner's opinion on this phase of the alleged error is admirably expressed by the Hon. Judge Acheson in the famous *Hat Trimmings case, Meyer et al. v. Cadwalader (C. C.), 49 Fed. 32,* wherein the facts strikingly similar to the case at bar said:

"It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it." Cited in *Griffin v. United States, 295 Fed. 439.*

The Hon. J. B. McPherson, District Judge, said in his Comments of the *Meyer v. Cadwalader (supra) case:*

"There, articles not unlike in tone to the article now under consideration appeared in several newspapers of general circulation published in Philadel-

phia; and, although there was no proof that these newspapers had been read by the jurors, Judge Acheson declared it to be incredible that they had not been read, and upon this assumption decided without hesitation that an improper influence had thus been brought to bear to obtain a verdict."

"Under our system of jurisprudence, at least, cases are tried upon evidence that is carefully scrutinized, and not upon insinuation and hearsay; and it is an attack upon the prisoner's constitutional rights to influence the jurors."

"A new trial is granted in each case." *United States v. Ogden, 105 Fed. 371."*

"It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. *United States v. Ogden (D. C.), 105 Fed. 371; Mattox v. United States, 146 U. S. 140, 150, 13 Sup. Ct. 50, 36 L. Ed. 917; McKibben v. Philadelphia & Reading Railway Company, 251 Fed. 577, 163 C. C. A. 571."*

The courts have held that it was not necessary for the jury to read any articles but quite sufficient to sustain a reversal if merely exposed to the improper influence.

A "fraud order" was published prominently in Cincinnati papers and so presumably came to jury's attention,

"* * * this was an unfortunate coincidence, and the occurrence of it was beyond the control of the trial judge; but it was of itself sufficient to make impossible that fair trial to which every respondent is entitled." *Harrison v. United States, 200 Fed. 669.*

The courts have zealously guarded the right of a fair trial by jury and new cases are added daily to that long line of affirming decisions maintaining the purity of our juries and their protection from any possible outside influence. The courts have gone so far as to rule that even counsel cannot waive or acquiesce in the waiver of that right of the defendant.

Petitioner respectfully avers that the defendant in the circumstances surrounding the instant case when tried, could not have that fair trial which was his "sacred right."

XI.

Petitioner Avers the Sentence Is So Severe and Oppressive As To Be Wholly Disproportionate To the Offense and Obviously So Unreasonable That It Violates the Substantial Rights Of the Defendant.

Counsel do not aver that a sentence of death is cruel and excessive punishment. There are numerous crimes set out in the statutes, the extreme penalty of which is death, and though the penalty is extreme, it is in some cases warranted and justified by the circumstances.

In too many cases the extreme penalty is grossly disproportionate to the offense committed and where the penalty is so severe and oppressive, and obviously unreasonable, it must be said to violate due process.

A crime that warrants a death penalty, is one that has the color, display, or action of hostility. Such an

act as would show a wanton disregard of the consequences, a wilful, deliberate contemplated scheme of acts set in motion, with a careless unconcern of the result, irrespective whom those results hurt, maim or kill. Any set of circumstances that starts a series of acts in which there is an utter disregard of human life, that is not only shocking but revolting to the human conscience, should be made punishable with the extreme penalty.

At times the death penalty is so manifestly repugnant to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally.

When a court of justice awards punishment for a breach of the law the object is not vengeance, but is intended to serve as a deterrent to the repetition of crime.

What did Max Stephan do to justify the cruel and excessive punishment meted out by the sentencing judge? Every act attributed to him was an act of benevolence (R. 62, 75, 76, 168, 225), a series of kindly acts, without the slightest trace of rancor, hatred, hostility or wanton disregard of the results. On the contrary, the acts were manifestly prompted by a desire and the intent to help an unfortunate individual who had refused to "go back where he came from," who had related stories of conditions from whence he had come, stories that impelled the heart of Max Stephan to help a boy in distress, and he fed, clothed and entertained that "runaway boy" without the intent or motive to do a wrongful act.

The measure of petitioner's intent is in the nature of the acts that he did, each, and all of them the very essence of personal aid, and not treasonable.

Using the recorded acts, as a "measuring stick," had the defendant in this cause been sentenced for harboring an alien enemy, even then a long incarceration as punishment would be unreasonable in fitting the punishment to the crime. Comparing these acts of Max Stephan; were they treasonable?

To punish treason with either death or imprisonment lies wholly within the discretion of the court, but,

> "the provision of the Federal Constitution prohibiting cruel and unusual punishment is addressed to the courts of the United States having criminal jurisdiction and is a limitation on their discretion." *Ex Parte Watkins, 7 Peters (U. S.) 568, 8 L. Ed. 786.*

The court went far beyond and outside of the record in pronouncing sentence (R. 346-362), indicating that after verdict had been rendered, the court had permitted reports on defendant's acts *(dehors record)* previous to, and subsequent to his naturalization as an American citizen to color his deliberations, pending judgment and sentence.

Counsel for petitioner reluctantly and cautiously direct themselves to this question, but they are under compulsion to respectfully contend the defendant was tried for committing overt acts of treason; that the evidence adduced on the trial could not, and did not support the overt acts of treason; that no acts of the defendant previous to (R. 347-353), nor subsequent to the overt acts charged were admissible as evidence nor could they be entertained by the honorable judge in the exercise of the discretion granted the courts to determine the sentence in a capital case. *(25 Fed. Cas. Nos. 14,692, 14,693; 1 Burr. Tr. 196; United States v. Fries, 9 Fed. Cas. No. 5126, page 914;*

United States v. Bollman, 8 U. S. 75; Logan v. United States, 144 U. S. 309; Sprinkle v. United States, 159 U. S. 59 (citing cases); United States v. Fricke, 259 Fed. 673; United States v. Robinson, 259 Fed. 691; United States v. Schaefer ,251 U. S. 482.)

The rules that grant courts the right to confer with probation officers, previous to passing sentence, could not be extended to representatives and reports of the Federal Bureau of Investigation (R. 346) as was done in the instant case.

The court's mind must be free from the color of extraneous matters. In weighing the facts in the case it is the duty of the judge in a capital case to confine his reasoning to the issues in the case and not inflict punishment for crimes and misdemeanors, as in the instant case, wholly unrelated to the overt acts of treason.

> "Anciently, when under the barbarous doctrine of an eye for an eye, and a tooth for a tooth, 'punishment' was deemed to be, as the word implies, largely compensatory, the natural and logical conception of a sentence for a crime was that the 'punishment' should be nicely graduated to the nature and circumstances of the offense. * * * The modern conception of 'punishment' however, and the one that, so far as we can ascertain, has always obtained in this state, takes practically no account of compensation. * * * Obviously, then, the office of a judicial sentence, for crime, cannot, under this conception of 'punishment' be altogether the same as when society demanded payment, complete and more or less in kind, for infractions of its laws. No longer is proportionate punishment to be meted out to the criminal, measure for measure; but the unfortunate offender is to be committed to the charge of the officers of the state, as a sort of penetential ward." * * * *42 LRANS 978; Ann. Cas. 1914A, 1248.*

"Hatred and revenge enter largely into punishment among barbarians and savages; but among civilized people, punishment is only inflicted for the purpose of protecting society, and not for revenge. In other words the law never seeks a victim, but only seeks to reform the offender and set an example which will deter others from committing similar offenses, and by both of these means it seeks to protect society." *16 C. J. 1351 f. n. 46.*

Counsel contend that a fair trial was impossible, that the verdict violated his constitutional rights, that the sentence was disproportionate to the offense, cruel and excessive and that the death penalty should be set aside.

RELIEF SOUGHT.

Because of the foregoing prejudicial errors, it is respectfully submitted that the writ prayed for should be issued.

Respectfully submitted,

NICHOLAS SALOWICH,
JAMES E. McCABE,
Petitioners.

NICHOLAS SALOWICH,
JAMES E. McCABE,
Attorneys for Petitioner.